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No. 16, Original Jurisdiction.

IN THE

SUPREME COURT OF THE UNITED STATES.

TO THE OCTOBER TERM, A. D. 1925.

THE STATE OF WISCONSIN,
THE STATE OF OHIO,
THE STATE OF PENNSYLVANIA
and THE STATE OF MINNESOTA,
Complainants,

vs.

THE STATE OF ILLINOIS and the
SANITARY DISTRICT OF
CHICAGO,
Defendants.

Bill in Equity
Original
Jurisdiction.

No. [redacted] 7

DEMURRER OF THE STATE OF ILLINOIS TO THE AMENDED BILL OF COMPLAINT.

OSCAR E. CARLSTROM,
Attorney-General of Illinois.

JOHN T. KENWORTHY, Rock Island, Illinois,
CYRUS E. DIETZ, Moline, Illinois,
Solicitors for the Defendant, the State of Illinois.

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THE STATE OF WISCONSIN, THE STATE OF OHIO, THE STATE OF PENNSYLVANIA and THE STATE OF MINNESOTA, Complainants, vs. THE STATE OF ILLINOIS and the SANITARY DISTRICT OF CHICAGO, Defendants.	Bill in Equity Original Jurisdiction. No. 16.

DEMURRER OF THE STATE OF ILLINOIS TO THE AMENDED BILL OF COMPLAINT.

And now comes the State of Illinois, by Oscar E. Carlstrom, its Attorney-General, and demurs to the amended bill of complaint filed herein, and says that the said amended bill of complaint and the matters therein contained, in manner and form as the same are therein set forth and stated, are not sufficient in law for the said States of Wisconsin, Ohio, Pennsylvania and Minnesota, or either or any of them, to have and maintain their afore-

said action against the State of Illinois, and that the State of Illinois is not bound by the law of the land to answer the same; and the said State of Illinois states and shows to the Court here the following causes of demurrer to said amended bill of complaint:

First. That it appears upon the face of said amended bill of complaint that this is not a case justiciable in this Honorable Court when exercising its original and exclusive jurisdiction under the Constitution of the United States.

Second. That it appears upon the face of said amended bill of complaint that the subject matter thereof relates to the navigability of navigable waters of the United States, over which the United States has superior, supreme and exclusive jurisdiction; and that the United States has assumed and is exercising such jurisdiction.

Third. That it appears upon the face of the amended bill that the diversion complained of therein is being made pursuant to a written permit therefor, duly issued and "authorized by the Secretary of War" and "recommended by the Chief of Engineers" of the United States, acting pursuant to the authority and provisions of the "Rivers and Harbors Act" of Congress of 1899, by which Act the Congress of the United States, as this Honorable Court has held in respect of this same diversion, in the case of Sanitary District v. United States, 266 U. S. 405, has validly conferred upon said officials the power, exclusive of any action by any state, to permit, regulate and control the amount and conditions of such diversion; and

that said permit constitutes a valid and legal authorization by the United States of said diversion.

Fourth. That the amended bill does not state facts sufficient to entitle the complainants to the equitable relief prayed for, or any part thereof, for the reasons:

(a) That, in so far as said amended bill seeks an injunction to restrain the permanent diversion from Lake Michigan of any water whatever, it relates solely to a subject matter over which the Congress, as this Honorable Court has held, has exclusive jurisdiction, which has been assumed, and is being exercised, by the United States.

(b) That, in so far as said amended bill seeks to have this Honorable Court determine the amount of diversion "reasonably required" for navigation, it calls for a usurpation by this Honorable Court of powers and functions vested by the Constitution in the Congress and by the Congress delegated to the Secretary of War with the approval of the Chief of Engineers.

(c) That, in so far as said amended bill seeks relief against an alleged impairment, through pollution, of the navigability of navigable waters of the United States, neither of the complainant states, nor any of their respective citizens, suffer any direct or special injury, because all of such waters, alleged to be polluted, lie wholly without and below all of the complaining states; that none of said states have any direct or proprietary interest in the navigable condition of such waters, and that the exclusive power to protect the navigable condition of these navigable waters is vested in the United States, and, in respect of the alleged pollution complained of, such power

is being exercised by the United States, and that none of said states, nor any of the citizens thereof, have any remedy in equity to control, or interfere with, the said exclusive power of the United States.

Fifth. That none of the complainant states have any right of action in equity to complain of any alleged breach or breaches of the conditions of said permit of March 3, 1925, because the power to enforce such conditions is vested solely and exclusively in the United States, because said permit is revocable by the Secretary of War if and when the conditions thereof are breached and because said Rivers and Harbors Act of 1899 itself provides adequate, available, special and exclusive remedies for violations of said act.

Sixth. That it affirmatively appears from the face of the amended bill that the United States is a necessary and indispensable party to this suit.

Seventh. That the rights asserted and the relief sought in and by the amended bill are contrary to, and inconsistent with, the rights asserted and the relief sought in and by the original bill herein, in the respect that the original bill conceded and admitted the right of the defendants to a diversion not in excess of four thousand one hundred and sixty-seven (4,167) cubic feet per second, and also to a diversion in excess of said amount if and when the Congress of the United States or the Secretary of War, acting upon the recommendation of the Chief of Engineers, should give a permit therefor, whereas, the amended bill denies such rights of the defendants, and

that, therefore, the complainants are now estopped from denying the said rights of the defendants and from seeking the relief as prayed for in said amended bill.

Eighth. That it appears upon the face of said amended bill of complaint that the States of Wisconsin, Ohio, Pennsylvania and Minnesota have no lawful right to join in the prosecution of this action; that if there be, in fact, any legal cause of complaint against this defendant in said amended bill stated, which this defendant denies, it is a separate and independent cause, peculiar to each complaining state, and not a joint cause; that said bill is multifarious.

Ninth. That the said amended bill of complaint is in other respects uncertain, informal and insufficient, and it does not state facts sufficient to entitle the said States of Wisconsin, Ohio, Pennsylvania and Minnesota to the equitable relief prayed for in said bill.

WHEREFORE, for want of a sufficient bill of complaint in this behalf, the said defendant, the State of Illinois, demurs to said bill and to all the matters and things therein contained, and prays the judgment of this Honorable Court whether it shall be compelled to make any further or other answer to said bill, and that the said States of Wisconsin, Ohio, Pennsylvania and Minnesota may be barred from having or maintaining the aforesaid action against the defendant, the State of Illinois, and that this Honorable Court will not take further cognizance of this cause, but dismiss this bill, and that the defendant, the State of Illinois, be hence dismissed with its costs.

And this defendant, being not certainly advised as to whether the insufficiency of the amended bill, in the respects herein set forth, should be tested by demurrer or by motion to dismiss, respectfully requests, in case this Honorable Court should hold that such insufficiency should be tested by motion to dismiss, that then this Honorable Court will treat this demurrer as a motion to dismiss.

OSCAR E. CARLSTROM,
Attorney-General of Illinois.

JOHN T. KENWORTHY,
Rock Island, Illinois,
and

CYRUS E. DIETZ,
Moline, Illinois,
Solicitors for the State of
Illinois in this case.

We, the undersigned solicitors for the defendant, the State of Illinois, do hereby state that we have each read the foregoing demurrer; that upon the instructions laid before us regarding this cause there is good ground for the same, and that the foregoing demurrer is not interposed for delay, and that it is well taken.

JOHN T. KENWORTHY and
CYRUS E. DIETZ,
Solicitors for the Defendant, the
State of Illinois.